

**40 CFR Part 272**

[FRL-5188-8]

**Hazardous Waste Management Program: Incorporation by Reference of Approved State Hazardous Waste Program for New Mexico****AGENCY:** Environmental Protection Agency.**ACTION:** Immediate final rule.

**SUMMARY:** Under the Resource Conservation and Recovery Act of 1976, as amended (RCRA), the United States Environmental Protection Agency (EPA) may grant Final Authorization to States to operate their hazardous waste management programs in lieu of the Federal program. EPA uses part 272 of Title 40 Code of Federal Regulations (CFR) to provide notice of the authorization status of State programs, and to incorporate by reference those provisions of the State statutes and regulations that EPA will enforce under RCRA Section 3008. Thus, EPA intends to codify the New Mexico authorized State program in 40 CFR Part 272. The purpose of this action is to incorporate by reference EPA's approval of recent revisions to New Mexico's program.

**DATES:** This document will be effective on August 21, 1995 unless EPA publishes a prior **Federal Register** action withdrawing this immediate final rule. All comments on this action must be received by the close of business on July 20, 1995. The incorporation by reference of certain New Mexico statutes and regulations was approved by the Director of the Federal Register as of August 21, 1995 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

**ADDRESSES:** Written comments should be sent to Alima Patterson, Region 6 AR-NM Authorization Coordinator, Grants and Authorization Section (6H-HS), RCRA Programs Branch, U.S. EPA Region 6, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202, Phone #: 214-665-8533.

**FOR FURTHER INFORMATION CONTACT:** Alima Patterson, Region 6 AR-NM Authorization Coordinator, Grants and Authorization Section (6H-HS), RCRA Programs Branch, U.S. EPA Region 6, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202, Phone #: 214-665-8533.

**SUPPLEMENTARY INFORMATION:****Background**

Section 3006 of the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. 6926 *et*

*seq.*, allows the U.S. Environmental Protection Agency (EPA) to authorize State hazardous waste programs to operate in the State in lieu of the Federal hazardous waste program. The purpose of today's **Federal Register** document is to incorporate by reference EPA's approval of recent revisions to New Mexico's program.

Effective December 13, 1993 (see 58 FR 52677), EPA incorporated by reference New Mexico's then authorized hazardous waste program. Effective December 21, 1994 (see 59 FR 51122), EPA granted authorization to New Mexico for additional program revisions. In this document, EPA is incorporating the currently authorized State hazardous waste program in New Mexico.

EPA provides both notice of its approval of State programs in 40 CFR part 272 and incorporates by reference therein the State statutes and regulations that EPA will enforce under section 3008 of RCRA. This effort will provide clearer notice to the public of the scope of the authorized program in New Mexico. Such notice is particularly important in light of the Hazardous and Solid Waste Act Amendments of 1984 (HSWA), Public Law 98-616. Revisions to State hazardous waste programs are necessary when Federal statutory or regulatory authority is modified. Because HSWA extensively amended RCRA, State programs must be modified to reflect those amendments. By incorporating by reference the authorized New Mexico program and by amending the Code of Federal Regulations whenever a new or different set of requirements is authorized in New Mexico, the status of Federally approved requirements of the New Mexico program will be readily discernible.

The Agency will only enforce those provisions of the New Mexico hazardous waste management program for which authorization approval has been granted by EPA. This document incorporates by reference provisions of State hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and Federally enforceable program. Concerning HSWA, some State requirements may be similar to HSWA requirements that are in effect under Federal statutory authority in that State. However, a State's HSWA-type requirements are not authorized and will not be codified into the CFR until the Regional Administrator publishes his final decision to authorize the State for specific HSWA requirements. Until such time, EPA will enforce the HSWA

requirements and not the State analogues.

**New Mexico Authorized Hazardous Waste Program**

EPA is incorporating by reference the New Mexico authorized hazardous waste program in subpart GG of 40 CFR part 272. The State statutes and regulations are incorporated by reference at § 272.1601(b)(1) and the Memorandum of Agreement, the Attorney General's Statement and the Program Description are referenced at § 272.1601(b)(5), (b)(6) and (b)(7), respectively.

The Agency retains the authority under Sections 3007, 3008, 3013 and 7003 of RCRA to undertake enforcement actions in authorized States. With respect to such an enforcement action, the Agency will rely on Federal sanctions, Federal inspection authorities, and the Federal Administrative Procedure Act rather than the authorized State analogues to these requirements. Therefore, the Agency does not intend to incorporate by reference for purposes of enforcement such particular, authorized New Mexico enforcement authorities. Section 272.1601(b)(2) of 40 CFR lists those authorized New Mexico authorities that are part of the authorized program but are not incorporated by reference.

The public also needs to be aware that some provisions of the State's hazardous waste management program are not part of the Federally authorized State program. These non-authorized provisions include:

(1) Provisions that are not part of the RCRA Subtitle C program because they are "broader in scope" than RCRA Subtitle C (see 40 CFR 271.1(i)); and

(2) Federal rules for which New Mexico is not authorized, but which have been incorporated into the State regulations because of the way the State adopted Federal regulations by reference.

State provisions which are "broader in scope" than the Federal program are not incorporated by reference for purposes of enforcement in 40 CFR part 272. Section 272.1601(b)(3) of 40 CFR lists for reference and clarity the New Mexico statutory and regulatory provisions which are "broader in scope" than the Federal program and which are not, therefore, part of the authorized program being incorporated by reference. "Broader in scope" provisions will not be enforced by EPA; the State, however, will continue to enforce such provisions.

New Mexico has adopted but is not authorized for the Federal rules

published in the **Federal Register** from January 28, 1983 through March 20, 1984 (48 FR 3977, 48 FR 39611, 48 FR 52718, 49 FR 5308, and 49 FR 10490); the Federal rules regarding corrective action published on July 15, 1985 (50 FR 28702) and December 1, 1987 (52 FR 45788); the September 1, 1988 (53 FR 33938) and the July 1, 1991 (56 FR 30200) amendments to parts 264 and 265 addressing liability requirements; amendments to the Toxicity Characteristic rule as published on October 5, 1990 (55 FR 40834), February 1, 1991 (56 FR 3978), February 13, 1991 (56 FR 5910) and April 2, 1991 (56 FR 13406); and amendments to the F037 and F038 listings as published on May 13, 1991 (56 FR 21955). Therefore, these Federal amendments included in New Mexico's adoption by reference of Federal code at Parts I, II, III, V, VI, and IX are not Federally enforceable.

Since EPA cannot enforce a State's requirements which have not been reviewed and approved according to the Agency's authorization standards, it is important that EPA clarify any limitations on the scope of a State's approved hazardous waste program. Thus, in those instances where a State's method of adopting Federal law by reference has the effect of including unauthorized requirements, EPA will provide this clarification by: (1) Incorporating by reference the relevant State legal authorities according to the requirements of the Office of Federal Register; and (2) subsequently identifying in 272.1601(b)(4) any requirements which while adopted and incorporated by reference, are not authorized by EPA, and therefore are not Federally enforceable. Thus, notwithstanding the language in the New Mexico hazardous waste regulations incorporated by reference at 272.1601(b)(1), EPA would only enforce the State provisions that are actually authorized by EPA. With respect to HSWA requirements for which the State has not yet been authorized, EPA will continue to enforce the Federal HSWA standards until the State receives specific HSWA authorization from EPA.

#### HSWA Provisions

As noted above, the Agency is not amending part 272 to include HSWA requirements and prohibitions that are immediately effective in New Mexico and other States. Section 3006(g) of RCRA provides that any requirement or prohibition of HSWA (including implementing regulations) takes effect in authorized States at the same time that it takes effect in non-authorized States. Thus, EPA has immediate authority to implement a HSWA

requirement or prohibition once it is effective. A HSWA requirement or prohibition supercedes any less stringent or inconsistent State provision which may have been previously authorized by EPA (see 50 FR 28702, July 15, 1985).

Because of the vast number of HSWA statutory and regulatory requirements taking effect over the next few years, EPA expects that many previously authorized and incorporated by reference State provisions will be affected. The States are required to revise their programs to adopt the HSWA requirements and prohibitions by the deadlines set forth in 40 CFR § 271.21, and then to seek authorization for those revisions pursuant to part 271. EPA expects that the States will be modifying their programs substantially and repeatedly. Instead of amending the part 272 every time a new HSWA provision takes effect under the authority of RCRA 3006(g), EPA will wait until the State receives authorization for its analog to the new HSWA provision before amending the State's part 272 incorporation by reference. In the interim, persons wanting to know whether a HSWA requirement or prohibition is in effect should refer to 40 CFR 271.1(j), as amended, which lists each such provision.

The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the authorized State program and clarify the extent of Federal enforcement authority. This will be particularly true as more State program revisions to adopt HSWA provisions are authorized.

#### Certification Under The Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this action will not have a significant economic impact on a substantial number of small entities. It intends to incorporate by reference the decisions already made to authorize New Mexico's program and has no separate effect on handlers of hazardous waste in the State or upon small entities. This rule, therefore, does not require a regulatory flexibility analysis.

#### Compliance With Executive Order 12866

The Office of Management and Budget has exempted this rule from the requirements of Section 6 of Executive Order 12866.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, Federal agencies must consider the paperwork burden imposed by any information request contained in a proposed rule or a final rule. This rule will not impose any information requirements upon the regulated community.

#### List of Subjects in 40 CFR Part 272

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste transportation, Hazardous waste, Incorporation by reference, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: March 30, 1995.

**Allyn M. Davis,**

*Acting Regional Administrator.*

For the reasons set forth in the preamble, subpart GG of 40 CFR part 272 is amended as follows:

#### PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

1. The authority citation for part 272 continues to read as follows:

**Authority:** Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

2. 40 CFR part 272, subpart GG is amended by revising § 272.1601 to read as follows:

#### § 272.1601 New Mexico State-Administered Program: Final Authorization.

(a) Pursuant to Section 3006(b) of RCRA, 42 U.S.C. 6926(b), New Mexico has final authorization for the following elements as submitted to EPA in New Mexico's base program application for final authorization which was approved by EPA effective on January 25, 1985. Subsequent program revision applications were approved effective on April 10, 1990, July 25, 1990, December 4, 1992, August 23, 1994 and December 21, 1994.

(b) *State Statutes and Regulations.* (1) The New Mexico statutes and regulations cited in this paragraph are incorporated by reference as part of the hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(i) EPA Approved New Mexico Statutory Requirements Applicable to the Hazardous Waste Management Program, dated March, 1995.

(ii) EPA Approved New Mexico Regulatory Requirements Applicable to the Hazardous Waste Management Program, dated March, 1995.

(2) The following statutes and regulations concerning State enforcement, although not incorporated by reference, are part of the authorized State program:

(i) New Mexico Statutes 1978 Annotated, Inspection of Public Records Act, Chapter 14, Article 2, (1994 Cumulative Supplement), Sections 14-2-1 *et seq.*

(ii) New Mexico Statutes 1978 Annotated, Hazardous Waste Act,

Chapter 74, Article 4, (1993 Replacement Pamphlet), Sections 74-4-4 (except 74-4-4C), 74-4-4.1, 74-4-4.2C through 74-4-4.2F, 74-4-4.2G(1), 74-4-4.2H, 74-4-4.2I, 74-4-4.3 (except 74-4-4.3A(2) and 74-4-4.3F), 74-4-4.7B, 74-4-4.7C, 74-4-5, 74-4-7, 74-4-10, 74-4-10.1 (except 74-4-10.1C), 74-4-11 through 74-4-14.

(iii) New Mexico Hazardous Waste Management Regulations, Environmental Improvement Board (EIB), HWMR-7, as amended, October 21, 1992, Part IX, Sections 902 (except 902.B.1 through 902.B.6); and Part X, Sections 1001, 1004 and 1005.

(3)(i) The following statutory and regulatory provisions are broader in scope than the Federal program, are not part of the authorized program, and are not incorporated by reference:

(ii) New Mexico Statutes 1978 Annotated, Hazardous Waste Act, Chapter 74, Article 4, (1993 Replacement Pamphlet), Sections 74-4-3.3 and 74-4-4.2J.

(4) *Unauthorized State Provisions:* The State's adoption of the Federal rules listed below is not approved by EPA and are, therefore, not enforceable:

Federal requirement	Federal Register reference	Publication date
Biennial Report .....	48 FR 3977 .....	01/28/83
Permit Rules; Settlement Agreement .....	48 FR 39611 .....	09/01/83
Interim Status Standards; Applicability .....	48 FR 52718 .....	11/22/83
Chlorinated Aliphatic Hydrocarbon Listing (F024) .....	49 FR 5308 .....	02/10/84
National Uniform Manifest .....	49 FR 10490 .....	03/20/84
Liability Requirements .....	53 FR 33938 .....	09/01/88
Liability Requirements; Technical Amendment .....	56 FR 30200 .....	07/01/91

Additionally, New Mexico has adopted but is not authorized to implement the HSWA rules that are listed below in lieu of EPA. EPA will continue to enforce the Federal HSWA standards for which New Mexico is not authorized until the State receives specific authorization from EPA.

Federal requirement	Federal Register reference	Publication date
Corrective Action .....	50 FR 28702: Amendments to 264.90(a), 264.101(a)&(b), 270.60(b)(3) and 270.60(c)(3)(vii).	07/15/85
Permit Application Requirements Regarding Corrective Action .....	52 FR 45788: Amendments to 270.14(c), 270.14(d), 270.14(d)(1)(i)-(v), 270.14(d)(2) and 270.14(d)(3).	12/01/87
Corrective Action Beyond Facility Boundary .....	52 FR 45788: Amendments to 264.100(e), 264.100(e)(1), 264.100(e)(2) and 264.101(c).	12/01/87
Corrective Action for Injection Wells .....	52 FR 45788: Amendments to 265.1(c)(2) and 270.60(b)(3)(i)&(ii).	12/01/87
Toxicity Characteristic; Hydrocarbon Recovery Operations .....	55 FR 40834 .....	10/05/90
	56 FR 3978 .....	02/01/91
	56 FR 13406 .....	04/02/91
Toxicity Characteristic; Chlorofluorocarbon Refrigerants .....	56 FR 5910 .....	02/13/91
Revisions to the Petroleum Refining Primary and Secondary Oil/Water/Solids Separation Sludge Listings (F037 and F038).	56 FR 21955 .....	05/13/91

(5) *Memorandum of Agreement.* The Memorandum of Agreement between EPA Region VI and the State of New Mexico signed by the EPA Regional Administrator on May 19, 1994, is referenced as part of the authorized hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(6) *Statement of Legal Authority.* "Attorney General's Statement for Final Authorization", signed by the Attorney General of New Mexico in January, 1985, and revisions, supplements and addenda to that Statement dated April 13, 1988, September 14, 1988, July 19, 1989, July 23, 1992, February 14, 1994, July 18, 1994, July 20, 1994 and August 11, 1994 are referenced as part of the

authorized hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

(7) *Program Description.* The Program Description and any other materials submitted as part of the original application or as supplements thereto are referenced as part of the authorized hazardous waste management program under Subtitle C of RCRA, 42 U.S.C. 6921 *et seq.*

3. Appendix A to part 272, State Requirements, is amended by revising the listing for "New Mexico" to read as follows:

#### Appendix A to Part 272—State Requirements

\* \* \* \* \*

##### New Mexico

The statutory provisions include:

New Mexico Statutes 1978 Annotated, Hazardous Waste Act, Chapter 74, Article 4, (1993 Replacement Pamphlet), Sections 74-4-2, 74-4-3 (except 74-4-3L, 74-4-3O and 74-4-3R), 74-4-3.1, 74-4-4.2A, 74-4-4.2B, 74-4-4.2G introductory paragraph, 74-4-4.2G(2), 74-4-4.3F, 74-4-4.7 (except 74-4-4.7B and 74-4-4.7C), 74-4-9 and 74-4-10.1C, as published by the Michie Company, Law Publishers, 1 Town Hall Square, Charlottesville, Virginia 22906-7587.

The regulatory provisions include:

New Mexico Hazardous Waste Management Regulations, Environmental

Improvement Board (EIB), HWMR-7, as amended, October 21, 1992, Part I through Part VIII; Part IX, Sections 901, 902.B.1 through 902.B.6; and Part X, Section 1003. Copies of the New Mexico regulations can be obtained from the New Mexico Register, New Mexico Information Systems, P. O. Box 6703, Santa Fe, NM 87502.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 0 and 1

[ET Docket No. 93-266; FCC 95-218]

#### Pioneer's Preference Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** By this Third Report and Order, the Commission modifies certain rules regarding its pioneer's preference program. This action is intended to address directives of the General Agreement on Tariffs and Trade (GATT) legislation and make the pioneer's preference rules better comport with the Commission's experience administering them.

**EFFECTIVE DATE:** August 21, 1995.

**FOR FURTHER INFORMATION CONTACT:** Rodney Small, Office of Engineering and Technology, (202) 776-1622.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Third Report and Order, adopted June 6, 1995, and released June 8, 1995. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC Reference Center (Room 239), 1919 M Street NW., Washington, DC. The complete text of this decision also may be purchased from the Commission's duplication contractor, International Transportation Service, Inc., (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

#### Summary of Third Report and Order

1. The Third Report and Order (Third R&O) addresses proposals set forth in the Further Notice of Proposed Rule Making (Further Notice) in this proceeding, 60 FR 13396 (March 13, 1995), and modifies certain rules regarding the Commission's pioneer's preference program pursuant to recent legislation. The pioneer's preference program provides preferential treatment in the Commission's licensing processes for parties that make significant contributions to the development of a

new service or to the development of a new technology that substantially enhances an existing service.

2. The Further Notice proposed rules in response to the pioneer's preference directives contained in the legislation implementing domestically the GATT, as well as on the Commission's own motion. The GATT legislation requires parties to whom any licenses are awarded pursuant to the pioneer's preference program in services in which competitive bidding is used to pay 85 percent of the average price paid for comparable licenses. This payment may be made in a lump sum or in installment payments over a period of not more than five years. The GATT legislation, including the payment requirement, applies to any license issued on or after August 1, 1994 pursuant to a pioneer's preference award.

3. The legislation also directs the Commission to prescribe regulations specifying the procedures and criteria to "evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service." The legislation requires the pioneer's preference regulations to include: (1) Procedures and criteria by which the significance of a pioneering contribution will be determined, after an opportunity for review and verification by experts not employed by the Commission; and (2) such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of a pioneering contribution justifies any reduction in the amounts paid for comparable licenses. The regulations issued pursuant to this legislation must be prescribed not later than 6 months after enactment of the GATT legislation (i.e., by June 8, 1995), shall apply to pioneer's preference applications accepted for filing after September 1, 1994, and must cease to be effective on September 30, 1998, when the pioneer's preference program sunsets.

4. In the Further Notice, the Commission tentatively concluded that, with the exceptions of the two areas specifically addressed by the GATT legislation, the existing pioneer's preference rules, as modified by the Second Report and Order, 60 FR 13636 (March 14, 1995), comply with the GATT legislation's requirement to specify procedures and criteria by which to evaluate pioneer's preference applications. However, the Commission

solicited comment regarding any alternatives to any aspects of these rules that might better achieve the objectives of the GATT legislation.

5. With respect to the two areas specifically set forth in the GATT legislation, the Commission noted that the GATT legislation's directive that the Commission establish a procedure for review and verification by outside experts was contemplated as an optional measure by the current pioneer's preference policies, but that such "peer review" was not mandatory. It therefore proposed to formalize this policy pursuant to the GATT legislation to provide an opportunity for review of potentially pioneering proposals by experts in the radio sciences who are not Commission employees. It sought comment on whether such review by outside experts should be required in all cases or whether pioneer's preference applicants (or other interested parties) should be given only an opportunity for such review, which may be either accepted or declined by the applicants. It tentatively concluded that it would establish a peer review process on a permanent basis. The Commission therefore proposed to delegate to the Chief of the Office of Engineering and Technology ("Chief, OET") the authority to select a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request. In addition, while the Commission sought comment on two possible interpretations of section 309(j)(13)(D)(i) of the GATT legislation, which concerns possible conflicts of interest of such experts, it proposed appointing experts who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. Based on its experience with the pioneer's preference program, the Commission tentatively concluded that the outside expertise required to evaluate the claims made in pioneer's preference requests will vary greatly. Accordingly, it proposed that its staff evaluate on a case-by-case basis how much outside assistance is required and that the Chief, OET select experts from all available sources after reviewing the proposed new technology or service.

6. The Commission further proposed that the experts generally be granted a period of up to 180 days to present their findings to the Commission. It sought comment on whether it should generally seek the experts' individual opinions or their consensus (as a Federal Advisory Committee under the Federal Advisory Committee Act). The Commission